

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 69 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1 to 5 No.

KANTILAL PARBHUBHAI

Versus

JHINABHAI KUNVERJI

Appearance:

MR DU SHAH for Petitioner

MR RN SHAH for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 25/03/98

ORAL JUDGEMENT

This Second Appeal has been filed by the original defendant no.1 challenging nonconcurrent finding of judgment and decree of the lower Appellate Court.

The brief facts are that the plaintiff filed a suit for permanent injunction restraining the defendants from using their way through western shedha of survey

no.717/2 .This user of passage was alleged since 1938. The defendants purchased survey no.717/2 from Manjulaben Bhikhabhai through a registered saledeed dated 9.7.1973. Since the defendants attempted to obstruct the plaintiffs passage a suit for permanent injunction was filed.

The suit was resisted by the defendant no.1 who is appellant in this Court on the ground that the plaintiffs or their predecessors in title never used the suit way. In addition to the plea of nonuser of the suit way, the appellant contended alternative passage which could be used through a Nal to the north of the said survey number.

The parties went in trial. No case of easement of necessity was pleaded by the appellant in the Trial Court nor any evidence was adduced on the point. Similarly plea of extinction of easement of necessity under section 41 of the Easement Act, was also not taken in the written statement of the defendant no.1 nor any evidence was adduced on the point. Still the Trial Court accepted the belated case of the appellant that the easement was not in the nature of grant created under the partition deed exhibit 36 as recognised by a decree of competent court contained in exhibit 37. The Trial Court further found that the easement of necessity extinguished under section 41 of the Easement Act, because of the existence of alternative passage which can be created through Nal.

An Appeal was preferred. The Appellate Court disagreeing with the view taken by the Trial Court came to the conclusion that the partition deed exhibit 36 and the decree of the competent court, exhibit 37 created an absolute grant of passage and not that it was a grant of easement of necessity which can be extinguished on the alleged plea of the alternative passage through Nal. The suit was accordingly decreed and the defendants were permanently restrained from obstructing the plaintiffs user of the disputed passage.

In this Second Appeal the following substantial questions of law were formulated :

- (1) Whether in a partition deed, the parties interse can , make an absolute grant.
- (2) Whether Exs.36 and 37 create an easement of necessity or an absolute grant.
- (3) Whether an easement of necessity is

liable to be extinguished under section 41 of the Easement Act.

Mr.D.U.Shah, learned Counsel for the appellant was heard. Mr.R.N.Shah, learned Counsel for the respondent remained absent even in the revised list.

Coming to the first question as it is formulated, there is no legal prohibition in the parties creating absolute grant of passage in a deed of partition. No legal impediment could be shown in the course of argument from the side of the appellant that such absolute grant cannot be created by the parties under partition deed. The first question has therefore to be answered in affirmative.

Coming to the second substantial question it has to be seen whether partition deed exhibit 36 created absolute grant or only easement of necessity. The lower Appellate Court has considered the oral and documentary evidence on record and has taken note of the material contents of the deed of partition as well as decree of the competent court and it has come to the conclusion that these two documents created absolute grant of passage and not easement of necessity. The lower Appellate Court further found that the alternative case of easement of necessity was neither pleaded in the written statement of the appellant nor any evidence was adduced hence, it cannot be accepted. As a corollary to this finding, it was further held that if there existed no easement of necessity the same can not be extinguished under section 41 of the Easement Act. The belated contention of easement of necessity and its extinction was also considered by the lower Appellate Court and it found that the case of easement of necessity could not be extinguished because the so called alternative passage through Nal was not serviceable. From the evidence on record, it concluded that there were pits in Nal. There were also standing trees in the said Nal and water also used to remain in the said Nal in a specific portion. Under these circumstances, the lower Appellate Court, from the evidence, found that there was no alternative passage, hence the easement of necessity could not be extinguished. It further found from the oral and documentary evidence on record that it was not a case of easement of necessity but absolute grant which flowed from the partition deed and decree of the competent court. Contesting defendant-appellant being subsequent purchaser had no right to obstruct right of passage in the nature of absolute grant which was used since 1938 by the plaintiffs forefathers and thereafter by the

plaintiffs.

The lower Appellate Court after considering the recital in the partition deed and decree exhibit 37 rightly concluded that it was not a case of easement of necessity which was created through these two documents. Detailed reasons have been given by the lower Appellate Court in support of its findings on the point. One of the reasons is that in the partition deed as well as in the decree of the competent court there is no mention that easement of necessity was created. It may also be noted that a Nal existed since 1938 when the partition took place. If alternative passage was available there was no reason even for granting easement of necessity by implication. Inference therefore is that absolute grant was made in the deed of partition which was recognised by the competent court in its decree exhibit 37.

Further from the oral evidence of the plaintiff and his two witnesses Haribhai Khushalbhai and Mohmadji Musaji the lower Appellate Court concluded that user of the disputed passage since 1938 by plaintiffs forefathers as well as by the plaintiffs is cogently established. This finding do not suffer from any infirmity. As such it is concluded that exhibits 36 and 37 created absolute grant in respect of the disputed passage and not easement of necessity. The substantial question no.2 is answered accordingly.

If it was a case of absolute grant of right of passage the same could not be extinguished under section 41 of the Easement Act. The substantial question no.3 is answered in negative.

In the result of the foregoing discussions I do not find any merit in this Second Appeal which is hereby dismissed. No order as to costs.

Sd/-

(D.C.Srivastava, J)

m.m.bhatt